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No. 643

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

W. V. KNOTT, AS STATE TREASURER AND EX OFFICIO INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, AND NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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The Solicitor General, on behalf of the petitioner, the United States of America, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above case on June 24, 1935.

OPINIONS BELOW

The orders of the Leon County Circuit Court (R. 198–200, 235–238, 253–254) are not reported. The opinion of the Supreme Court of the State of Florida (R. 347–356) is reported in 163 So. 64.

JURISDICTION

The judgment of the Supreme Court of Florida was entered June 24, 1935 (R. 357). Petitions for rehearing were denied on September 18, 1935 (R. 362). The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 10–13.

QUESTION PRESENTED

Whether the United States, under Section 3466 of the Revised Statutes, is entitled to priority over state creditors in claims to funds deposited as one of the statutory requirements for doing business in Florida.

STATEMENT

The New Jersey Fidelity and Plate Glass Insurance Company was placed in the hands of the Commissioner of Banking and Insurance of the State of New Jersey for liquidation on May 28, 1932 (R. 11). It had deposited with the Treasurer of the State of Florida securities of a face value of $75,000.00 (R. 1) in accordance with Sections 6302–6303, Compiled General Laws, *infra,* pp. 10, 11.

William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, filed a bill of complaint on December 19, 1932, in the Circuit

Court of Leon County, Florida, to prevent these securities from being paid to any person without an order of the court (R. 1–3). As amended, the bill requested that certain priority claims of the United States be excepted from the requested injunction and restraining order (R. 4–6). A temporary restraining order was issued preventing the payment of any claims without an order of court, with the exception of seven claims of the United States (R. 6–8).

By an Act approved May 10, 1933 (Ch. 16248, Acts 1933), *infra*, p. 11, Section 6303, Compiled General Laws, was amended to provide for the chancery court taking charge of the assets of an insolvent surety company and distributing them, with priority to Florida creditors. On May 16, 1933, The London Operating Company, a Florida corporation, instituted suit for the relief provided by this Act (R. 9–12). On May 17, 1933, an order was filed appointing a receiver to take charge of the assets of New Jersey Fidelity and Plate Glass Insurance Company in Florida, and restraining all actions until further order of the Circuit Court of Leon County (R. 14–16). On May 25, 1933, the receivership proceeding was consolidated with that instituted by the New Jersey Commissioner (R. 18–19). The State Treasurer turned over to the receiver securities with a face value of $51,000.00, but retained in his possession bonds with a face value of $20,000.00 for payment of the afore-

mentioned judgment claim of the United States, presented in accordance with state law (R. 25–26). A rule was issued June 16, 1933, against the State Treasurer to show cause why the $20,000.00 should not be turned over to the receiver (R. 25–30).

A copy of the rule to show cause was served upon the United State Attorney for the Southern District of Florida, and he petitioned the United States District Court to enjoin the State Treasurer from turning over the securities he had set aside to pay the judgments of the United States. An injunction was issued which was dissolved on October 30, 1933, inasmuch as the court was of the opinion that the United States could file its claims in the receivership proceedings in Florida and have the merits of its claims adjudicated, with right of appeal to the Supreme Court of the United States (R. 163–164).

An order was entered in the state court on January 1, 1934 (R. 185), requiring the State Treasurer to turn over to the receiver the securities retained to pay the claims of the United States. The United States filed its claims in the Florida receivership proceedings on May 27, 1934 (R. 157–160, 165–166). On April 30, 1934, the Florida receiver filed an answer and motion to dismiss the several petitions and claims of the United States (R. 185–192).[1] The

[1] According to the dates given by the record, the answer was filed prior to the claims. One explanation appears to be the possibility that a formal filing of the claims had earlier been neglected.

Circuit Court of Leon County assumed jurisdiction over all parties and subject matter by order of May 16, 1934 (R. 194), and entered an order on May 28, 1934, denying the United States priority under Section 3466 of the Revised Statutes, holding that the securities deposited with the State Treasurer were for the protection of the State of Florida and its citizens and political subdivisions (R. 198–200). The receiver filed his report on June 14, 1934, and, in accordance with the court order, denied priority to the claims of the United States (R. 201, 204). The New Jersey Commissioner filed exceptions to other parts of the report of the receiver (R. 214) and also filed a petition on July 23, 1934, requesting that any surplus after paying Florida creditors be turned over to him (R. 218). On August 7, 1934, the court entered an order on the report of the receiver denying priority to the claims of the United States and reserving for future determination the question of whether the United States would be entitled to payment out of any surplus that might remain after payment of Florida creditors (R. 235–238).

A second report of the Florida receiver was filed on October 4, 1934, requesting a sale of all assets and a decree of distribution, with a further request that the court determine whether any surplus that might remain should be paid to the United States on account of its claims (R. 246, 248–249). The New Jersey Commissioner filed objections, on Octo-

ber 20, 1934, to the allowance of the claims of the United States in any surplus that might remain (R. 251): The court entered an order on October 27, 1934, authorizing the payment of those claims which were allowed as preferred and reserving for future determination the question of whether the claims of the United States should be paid out of any surplus (R. 253–254).

An order was entered permitting the United States to amend its claims (R. 298–302).

Both the United States (R. 303–304) and the New Jersey Commissioner (R. 279–280) appealed from the order of October 27, 1934. The Supreme Court of Florida rendered its opinion in which the court stated that claims or judgments recovered by the United States are not entitled to priority under U. S. C., Title 31, Sec. 191 (R. S. Sec. 3466), and that the Legislature of Florida is presumed to have enacted its protective legislation for the benefit of Florida creditors (R. 348, 355–356). The United States was denied any right to participate in the fund in question and the court stated that it was deemed sufficient in denial of the claim of the United States to point out that Congress has undertaken to prescribe special legislation for its own protection in the case of defaulted surety company bonds, by U. S. C., Title 6, Secs. 1–11 (R. 356).

The United States filed a petition for rehearing on July 23, 1935, which was denied on September 18, 1935 (R. 358, 362).

SPECIFICATION OF ERRORS TO BE URGED

The petitioner urges that the Supreme Court of Florida erred:

1. In denying the United States priority in the fund in question under Section 3466 of the Revised Statutes.

2. In denying the United States the right of participation in the fund on the ground that Congress has prescribed special legislation for its own protection in the case of defaulted surety company bonds by U. S. C., Title 6, Secs. 1–11.

3. In affirming (as modified) the decision of the Supreme Court of Leon County.

REASONS FOR GRANTING THE WRIT

1. The United States has been denied all right to participate in the fund,[2] and the decision of the

[2] The order of the Circuit Court of Leon County was modified to conform to the opinion. The opinion contains language, as to the possible claim of the United States in the residue after payment of Florida claims and transfer to the domiciliary liquidator, which is ambiguous (R. 356). It is, therefore, important that special note be made of its statement (R. 355–356) that:

"In this case the United States asserts *not only a right of participation in the security fund* of New Jersey Fidelity Plate Glass Insurance Co. on deposit with the State Treasurer under Section 6302 C. G. L., 4339 R. G. S., *but insists upon a priority of payment* of its claim out of such fund by reason of Sections 191 and 192, Title 31 U. S. C. A.

"We deem it a sufficient answer *in denial of the claim of the United States on the first proposition* to point out that by its own Acts of Congress the United States has undertaken to prescribe special legislation of its own choice for its own special protection in the case of defaulted surety company bonds, * * *"

Supreme Court of Florida is thus a final judgment or decree within the meaning of Section 237 of the Judicial Code. *Clark* v. *Williard,* 292 U. S. 112, 117–118.

2. The New Jersey Fidelity and Plate Glass Insurance Company is insolvent (R. 301–302), and Section 3466 of the Revised Statutes assures priority to the claims of the United States in all cases where a person indebted to the United States is insolvent. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134; *Lewis* v. *United States,* 92 U. S. 618, 621; *Bramwell* v. *United States Fidelity and Guaranty Co.,* 269 U. S. 483; *Price* v. *United States,* 269 U. S. 492.

It is established that local laws of a State cannot create priority in favor of other creditors and so defeat the priority of the United States. *Field* v. *United States,* 9 Pet. 182, 201; *United States* v. *Oklahoma,* 261 U. S. 253, 260; *Spokane County* v. *United States,* 279 U. S. 80, 92–93; *United States* v. *Porter,* 24 F. (2d) 139, 143 (D. Id.); *United States* v. *Bliss,* 40 F. (2d) 935 (D. Neb.); *State* v. *Thurston Bank,* 121 Neb. 407, 417.

At the present time there are various funds, which have been deposited by surety companies in different States for the purpose of doing business within the State, in which the United States is claiming priority. In each instance the surety company is insolvent, and most of the companies have very few, if any, assets other than these state

deposits. The claims of the United States against these funds aggregate several millions of dollars, and are now being presented in a number of proceedings in the different States.

When the surety companies requested authority of the United States to write bonds in favor of the Government, it was reasonably represented that these state deposits were part of their assets. If a surety company is permitted to deposit the great bulk of its assets in the funds required by the various States, and if the United States is not entitled to participate in the state deposits, the priority established by Section 3466 will in effect have been destroyed in the surety business.

3. The only legislation that Congress has prescribed for the protection of claims of the United States against insolvent persons that are indebted to the United States appears to be Section 3466 of the Revised Statutes. The legislation collected in U. S. C., Title 6, Secs. 1–11 has no discernible application to this question.[3]

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

DECEMBER 1935.

[3] The legislation relates to the custody and renewal of official bonds, examination of the surety on these bonds, eligibility of corporate sureties and quarterly statements of their condition, notice of delinquency of the principal, service of process, jurisdiction of suits on the bonds, and forfeiture of the surety's eligibility on nonpayment of a judgment.

APPENDIX

Section 3466 of the Revised Statutes of the United States (U. S. C., Title 31, Sec. 191):

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 6302, Compiled General Laws of Florida:

> *Requirements to do business in this State.*—Companies herein described, chartered by this State, or other States or foreign Governments, now doing business in this State, or hereafter doing business in this State, which offer or undertake to become surety upon any bond, or surety contract, before being accepted as surety thereon, shall be required to deposit with the Treasurer of this State bonds of the United States, or bonds of any State of the United States, and which amount according to their market value, to seventy-five thousand dollars which bonds shall be receipted for by the State Treasurer

and held or deposited by him. And whenever such company ceases to do business in this State, and has settled up all claims against it, as hereinafter provided, and has been released from all the bonds upon which they have been taken as sureties said bonds shall be delivered up to the proper party on presentation of the Treasurer's receipt for said bonds. While said bonds are so deposited with the Treasurer, the owner of the same shall be entitled to collect the interest on the same. For the bonds so deposited, the faith of the State is pledged that they shall be returned to the party or parties entitled to receive the same.

Section 6303, Compiled General Laws of Florida:

Final judgment against surety company.—Whenever final judgment has been rendered against any surety company on a fidelity or surety bond, said surety shall pay the same within thirty days. Upon notice of failure to pay said amount within said time, the State Treasurer shall retain said bonds, or so much thereof as may be necessary to cover said judgment and costs, subject to the order of the court trying any suit that may be brought upon such bond.

Chapter 16248, Laws of Florida, 1933:

SECTION 1. That Section 4340 of the Revised General Statutes of Florida of 1920, the same being Section 6303 of the Compiled General Laws of Florida 1927, be and the same is hereby amended to read as follows:

"6303 (4340) FINAL JUDGMENT AGAINST SURETY COMPANY.

"Whenever a final judgment has been rendered against any surety company on a fidelity, appearance, supersedeas or surety

bond, the surety on said bond shall pay the same within thirty days. Upon notice of failure to pay the amount due under said bond within said time, the State Treasurer shall retain the bonds or securities deposited with him by said surety company under Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, or as much thereof as may be necessary to cover said judgment and costs, subject to the order of the Court trying any suit that may be brought upon said bond: Provided, however, that in the event of the adjudication of insolvency of any such surety company by a court of competent jurisdiction, or in the event its assets should be placed in liquidation in the State of its incorporation, the Court of Chancery, at the seat of Government in Florida shall have jurisdiction, upon bill filed by any party in interest, to take charge of the securities so deposited with the State Treasurer under the provisions of Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, together with any other assets of such surety company, which may be marshaled in the State of Florida, to direct a sale of the said securities at public or private sale and on such terms as the said court deems proper and, after paying all costs and expenses, including reasonable counsel fees incurred in connection with said proceedings, all as allowed by the court, to distribute the proceeds of the sale of said securities proportionally among all of the Florida creditors who may make proof of their claims against any such surety company to the satisfaction of said court, the surplus, if any, to be disposed of by proper order of such court. The said court is em-

powered to ascertain, as far as practicable, the names and addresses of all Florida creditors and the amounts due and owing to them under bonds given by said surety company, and to notify the Florida creditors to make proof of their claims and to determine the validity and the amount due each of them. The claims of all Florida creditors of any such surety company not reduced to final judgment prior to the time the said Court of Chancery takes charge of such Florida assets shall participate in the proceeds of the sale of said securities and assets only on a proportional basis with other Florida creditors. Upon the said Court of Chancery assuming jurisdiction of the said securities and assets of such surety company, all actions against the said company and the said securities and assets shall be stayed, pending the further orders of said Court and the State Treasurer, and the State of Florida shall thereby be absolved from any further liability on account of said securities, and the right of said surety company to transact business in this State shall cease and determine.

"SECTION 2. All laws and parts of laws in conflict with this Act are hereby repealed.

"SECTION 3. This Act shall take effect upon becoming a law.

"Approved May 10, 1933."

U. S. GOVERNMENT PRINTING OFFICE: 1933